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IN THE
COURT OF APPEALS OF INDIANA

EUGENE OLSEN, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 75A05-0607-CR-372
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0506-FD-108

April 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Eugene Olsen, Sr., appeals his conviction for Performing Sexual Conduct in the Presence of a Minor,[1] a class D felony. Specifically, Olsen claims that the conviction must be reversed because his substantial rights were prejudiced when the State was permitted to amend the charging information on the day of trial, that the evidence was insufficient to support the conviction, and that the trial court erred in determining that he was required to register as a sex offender. Finding no error, we affirm the judgment of the trial court.

FACTS

Michelle Pitts is married and has three daughters. Their ages range from eleven to fifteen years old. Pitts's family rented a home in Knox from Olsen, who was Pitts's brother-in-law. Olsen and his wife lived approximately eight miles from the rental house.

On Saturday, May 21, 2005, Michelle's then-twelve-year-old daughter, S.P., spent the night at Olsen's home. The next morning, Olsen and S.P. made breakfast. Thereafter, S.P. took a popsicle from the freezer and started to watch television. Olsen was standing next to S.P., and at some point, S.P. saw Olsen "[pull] out his penis." Tr. p. 130. After the incident, S.P.'s aunt took her home, and S.P. told Pitts that "something freaked [her] out today really bad" and explained what Olsen had done. Id. at 75.

Later that afternoon, Olsen telephoned his son, Eugene, and remarked that he "was going to jail." Id. at 172. Olsen told Eugene that he had fondled himself as S.P. watched television. Olsen also informed Eugene that he had engaged in the conduct because of the

[1] Ind. Code § 35-42-4-5(c)(3).

way in which S.P. had been eating the popsicle.

On June 1, 2005, the State charged Olsen with the above offense, and the charging information read as follows:

> On or about the 22nd day of May, 2005, . . . Eugene Olsen, Sr., a person 18 years of age or older, to wit: 46, knowingly touched his own body, to-wit: pulled out his erect penis, in the presence of [S.P.] who is a child less [than] 14 years of age, to-wit: 12.

Appellant's App. p. 10. On April 24, 2006—the day of Olsen's jury trial—the State filed an amended information that included the language "with the intent to arouse the sexual desires of either the adult or child. . . ." Id. at 4, 20. Olsen moved to dismiss the information, but following a hearing, the trial court denied the motion and permitted the amendment. Following the presentation of evidence, the jury found Olsen guilty as charged. Olsen was subsequently sentenced to thirty months of incarceration with sixteen months suspended. At the sentencing hearing, the trial court directed Olsen to register as a sex offender. Olsen now appeals.

DISCUSSION AND DECISION

I. Amendment of Charging Information

Olsen argues that the trial court erred in allowing the State to amend the charging information on the day of trial. Specifically, Olsen claims that the amendment prejudiced him and "deprived him of an absolute defense." Appellant's Br. p. 5.

In resolving this issue, we initially observe that a charging information requires the State to set "forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition. . . ." Ind. Code § 35-34-1-6(a)(1). Our Supreme

Court has determined that an information may be amended at various stages of a prosecution, depending on whether the amendment affects the form or the substance of the original information. Fajardo v. State, 859 N.E.2d 1201, 1203 (Ind. 2007); see also I. C. § 35-34-1-5(b). In general, an information may be amended in three ways: to correct an immaterial defect that does not prejudice the defendant's substantial rights; to correct the form of the information; and to address matters of substance. Fajardo, 859 N.E.2d at 1203. Indiana Code section 35-34-1-5(b) states that an "information may be amended in matters of substance or form" at any time up to thirty days before the omnibus date before a felony. However, Indiana Code section 35-34-1-5(c) states that "[u]pon a motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant."

We note that an amendment is one of form, not substance, if a defense under the original information would be equally available after the amendment, and the defendant's evidence would apply equally to the information in either form. Fajardo, 859 N.E.2d at 1203. Conversely, an amendment is one of substance if it is essential to establishing a valid charge of the crime. Id.

In Fajardo, the State was permitted to add a second count of child molesting in addition to the original count that had been charged, two days before trial. Id. The additional count affected a possible defense because of timing issues and the age of the victim. Hence, the defendant's burden to establish the anticipated defense was increased. Id. Under those

circumstances, our Supreme Court determined that the addition of the second count amounted to a matter of substance, which required the application of the time requirement set forth in Indiana Code section 35-34-1-5(b). Thus, the defendant's conviction was reversed on this basis. Id. at 1208.

As noted above, the original information charged Olsen with the offense, absent the language "with the intent to arouse the sexual desires of either the adult or child." Appellant's App. p. 10. On the day of trial, however, the trial court permitted the State to add this language to the charging information. Id. at 4, 20.

Notwithstanding Olsen's challenge to the amendment, the original charging information referred to the crime and the specific subsection of the statute, which expressly addressed performing sexual conduct in a minor's presence. In other words, Olsen was put on notice of the elements of the crime charged when the original information was filed. Indeed, Olsen's counsel acknowledged that the original information referenced the relevant statute. Defense counsel also affirmed that he was aware that the statute "required an element of intent" prior to the State's amendment. Tr. p. 10-11. Moreover, because Olsen's case had been pending for over one year, it is not reasonable for him to suggest that the omission of the language in the original charging information had the effect of changing his defense. In other words, Olsen cannot successfully contend that he was not required to defend against the arousal element of the charge merely because of the omitted language. That said, it is apparent to us that the amendment was a change of form that did not substantially prejudice Olsen's rights. Indeed, the amendment did not add a new charge or

additional count or alter the class of the existing charge. And Olsen has made no showing that the amendment created or eliminated a possible defense or that it shifted the focus of the State's case in any way. Therefore, Olsen's claim of error fails.

II. Sufficiency of the Evidence

Olsen next claims that the evidence was insufficient to support his conviction. Specifically, Olsen contends that his conviction must be set aside because the State failed to prove that he committed the charged act "with the intent to arouse or satisfy the sexual desires of the complaining witness or himself." Appellant's Br. p. 8.

When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Rather, we will examine the evidence and the reasonable inferences that may be drawn therefrom that support the verdict and will affirm a conviction if there is probative evidence based on which a jury could find the defendant guilty beyond a reasonable doubt. Id. Put another way, we will affirm unless "no rational fact-finder" could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

A person commits the crime of performing sexual conduct in the presence of a minor when a "person eighteen (18) years of age or older . . . knowingly or intentionally . . . touches or fondles the person's own body, in the presence of a child less than fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of the child or the older person[.]" I.C. § 35-42-4-5(c)(3). Indiana Code section 35-41-2-2(b) provides that a person engages in

conduct "knowingly" if the person is aware of a high probability that he is doing so. An individual engages in conduct "intentionally" if, when he engaged in the conduct, it was his conscious objective to do so. I.C. § 35-41-2-2(a). We also note that intent is a mental state and, absent a defendant's confession, intent must be determined from a consideration of the defendant's conduct and the natural and usual consequences of that conduct. West v. State, 805 N.E.2d 909, 915 (Ind. Ct. App. 2004). Hence, the trier of fact may infer intent from the surrounding circumstances. E.H. v. State, 764 N.E.2d 681, 683 (Ind. Ct. App. 2002).

In this case, S.P. testified that she was visiting Olsen at his residence and watching cartoons on television. At some point, she looked up and noticed that Olsen had "pulled out his penis." Tr. p. 130. After Olsen's son asked what happened, Olsen admitted that he had committed the act and confided that he was going to jail. Id. at 173. Olsen further stated that he was fondling himself because he believed that S.P. had been eating a popsicle in a sexually suggestive manner. Id. In light of this evidence, it was reasonable for the jury to infer that Olsen committed the act with the intent to arouse or satisfy his sexual desire. Thus, we conclude that the evidence was sufficient to support Olsen's conviction.

III. Sex Offender Registry

Finally, Olsen argues that the trial court erred in requiring him to register as a sex offender. Specifically, Olsen maintains that the offense he committed is excluded from the registry requirement.

In resolving this issue, we initially observe that Olsen failed to object to the trial court's order directing him to register as a sex offender. Thus, his claim is waived. See

Nasser v. State, 646 N.E.2d 673, 676 (Ind. Ct. App. 1995) (holding that a party's failure to object at the trial court level generally waives the issue on appeal). Waiver notwithstanding, we note that Indiana Code section 11-8-8-5 (sex offender definition statute) defines a sex offender as a person who has been convicted of any of fifteen enumerated offenses, including "vicarious sexual gratification" as defined by Indiana Code section 35-42-4-5. Additionally, Indiana Code section 11-8-8-7 provides that an individual must register as a sex offender if that person resides in Indiana, spends or intends to spend at least seven days in Indiana during a one-hundred-eighty-day period, owns real property in Indiana and returns to Indiana at any time, works in Indiana, or is enrolled in a public or private educational program in Indiana.

In this case, Olsen was charged under subsection (c)(3) of Indiana Code section 35-42-4-5, which involves the touching or fondling of one's own body. The statute is entitled "vicarious sexual gratification; fondling in the presence of a minor." In our view, the legislature's express and general reference to Indiana Code section 35-42-4-5 in the sex offender definition statute without specifically listing or identifying any subsection unambiguously includes the crime for which Olsen was charged. In other words, although the sex offender definition statute uses the term "vicarious sexual gratification," we believe that all offenses defined under Indiana Code section 35-42-4-5 are included within the sex offender definition statute. Therefore, we reject Olsen's claim that the trial court erred in ordering him to register as a sex offender.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.